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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
8

9 N2 Packaging Systems, LLC, an Arizona
10 limited liability company,

11 Plaintiff,

12 v.

13 N2 Pack Canada Inc., an unincorporated
14 fictitious entity; Eric Marciniak,
15 individually; Brendan Pogue, individually;
16 Alejo Abellan aka Alex Abellan,
17 individually; Chakra Cannabis Corp., a
18 Canadian federal corporation; and DOES 1-
19 10, inclusive,

20 Defendants.

21 1079765 B.C. Limited d/b/a N2 Pack Canada,
22 Inc., a British Columbia entity; Eric
23 Marciniak; Brendan Pogue; Alejo Abellan
24 aka Alex Abellan; Chakra Cannabis Corp., a
25 Canadian federal corporation,

26 Counterclaimants,

27 v.

28 N2 Packaging Systems, LLC, an Arizona
limited liability company,

Counter-defendant.

No. CV-19-02351-PHX-NVW

ORDER

1 Before the Court are Plaintiff and Counter-defendant N2 Packaging Systems, LLC's
2 Motion for Leave to Amend First Amended Complaint (Doc. 72) and the opposition of
3 Defendants and Counterclaimants Eric Marciniak, Brendan Pogue, Alejo Abellan aka Alex
4 Abellan, and Chakra Cannabis Corp., and of Counterclaimant 1079765 B.C. Limited d/b/a
5 N2 Pack Canada, Inc. (Doc. 73). The motion will be denied.

6 **I. BACKGROUND**

7 N2 Packaging alleges it has a proprietary process for packaging certain controlled
8 substances (the Proprietary Process). This litigation concerns an alleged scheme among
9 Defendants and a nonparty to misappropriate the Proprietary Process.

10 **A. Procedural History**

11 N2 Packaging brought the Original Complaint on February 22, 2019 in the Arizona
12 Superior Court in and for Maricopa County alleging claims against N2 Pack, Marciniak,
13 Pogue, Abellan (the Original Defendants) and fictitious parties for (1) breach of contract,
14 (2) breach of the implied covenant of good faith and fair dealing, (3) alter ego, (4) patent
15 infringement, (5) inducement of patent infringement abroad, (6) violation of Section 43(a)
16 of the Lanham Act, and (7) violation of A.R.S. § 44-1522. The action was removed to this
17 Court.

18 Eight days later, N2 Packaging filed the First Amended Complaint and a motion to
19 remand. The First Amended Complaint (1) added Chakra as a defendant, (2) added breach
20 of contract claims against Abellan and Chakra, (3) added a claim for tortious interference
21 with contract against Abellan, (4) added a fraud in the inducement claim against Abellan,
22 (5) added a fraud in the inducement claim against Abellan, Marciniak, and Pogue, and (6)
23 added a punitive damage claim. Notably, it also attempted to remove the patent claims and
24 the Lanham Act claim.

25 N2 Packaging argued for remand under an exclusive forum selection clause in the
26 N2 Pack Canada Supply Agreement. The Court denied remand because the First Amended
27 Complaint, in substance, retained N2 Packaging's patent infringement claims, over which
28 federal courts have exclusive jurisdiction. While N2 Packaging purported to delete the

1 patent infringement claims, it relabeled the patents as “intellectual property” and alleged
2 them in detail.

3 Defendants also moved to dismiss the First Amended Complaint for lack of personal
4 jurisdiction over Marciniak and Pogue and failure to state a claim for alter ego, punitive
5 damages, and A.R.S. § 44-1522, the latter of which N2 Packaging withdrew. The motion
6 was denied because Marciniak and Pogue were personally bound by the consent to personal
7 jurisdiction in Arizona in the Supply Agreement. Though they signed the Supply
8 Agreement in the name of N2 Pack, they never formed it and were therefore individually
9 bound by that contract under promoter liability. Arizona personal jurisdiction over
10 Marciniak and Pogue flows from their consent in the Supply Agreement.

11 On November 8, 2019, Defendants answered the First Amended Complaint and,
12 along with B.C. Limited, pleaded counterclaims against Plaintiff for (1) breach of contract,
13 (2) breach of the implied covenant of good faith and fair dealing, (3) a declaration of non-
14 infringement of United States Patent No. 8,863,947, and (4) a declaration of no confidential
15 information or trade secret in published patent and/or patent application.

16 Discovery, however, was already underway. The parties exchanged disclosures that
17 “may be relevant to any party’s claims or defenses.” (Doc. 4 at 7.) On December 20, 2019,
18 Defendants served discovery requests on N2 Packaging. Supplemental disclosures were
19 served by all parties in January and February 2020.

20 At the case management conference on February 6, 2020, N2 Packaging stated it
21 would likely move to file another amended complaint to “clarify the claims and the facts
22 of which each arise.” (Doc. 67 at 17:4.) The case management order set March 6, 2020 as
23 the deadline for filing a motion for leave to amend, August 28, 2020 for completion of fact
24 discovery, and November 20, 2020 for completion of expert discovery. N2 Packaging
25 moved to file the proposed Second Amended Complaint.

26 **B. The Second Amended Complaint**

27 The Second Amended Complaint again aims to transform this case. It would
28 “clarify the factual basis for causes of action previously stated,” add Nitrofin, Inc., as an

1 additional defendant, and “assert additional causes of action against Nitrocin relating to
 2 Nitrocin’s misappropriation of N2 Packaging’s trade secrets and confidential information.”
 3 (Doc. 72 at 2.) But the Second Amended Complaint would do much more. It would also
 4 (1) convert the tortious interference with contract claim against Abellan into tortious
 5 interference with business expectancy claim against Abellan, Marciniak, and Pogue, (2)
 6 convert the fraud in the inducement claim against Abellan into a fraud claim, (3) convert
 7 the fraud in the inducement claim against Abellan, Marciniak, and Pogue into a fraud claim,
 8 and (4) add one trade secret misappropriation claim under the federal Defend Trade Secrets
 9 Act and another under the Arizona Uniform Trade Secrets Act.

10 This addition of two trade secret claim shows how substantially the Second
 11 Amended Complaint departs from the first. N2 Packaging (1) removes most of the
 12 contentions regarding its patents, including all of the patent descriptions, (2) adds sections
 13 titled “Plaintiff’s Equipment Trade Secrets” and “Confidential Information under the N2
 14 Canada Supply Agreement,” and (3) adds two sections concerning Nitrocin’s conduct.
 15 Many of the allegations, including those in support of the legacy causes of action, reflect
 16 the assets that are now centerstage, N2 Packaging’s “Confidential Information.” (*See, e.g.*,
 17 Doc. 72-1 at ¶¶ 201-02.)

18 **II. DISCUSSION**

19 “The court should freely give leave [to amend] when justice so requires.” Fed. R.
 20 Civ. P. 15(a)(2). This policy is applied with “extreme liberality.” *Owens v. Kaiser Found.*
 21 *Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001).¹ However, leave “is not to be granted
 22 automatically.” *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 738 (9th
 23 Cir. 2013). Five factors are to be considered on whether to grant leave to amend: “undue
 24 delay, the movant’s bad faith or dilatory motive, repeated failure to cure deficiencies by
 25 amendments previously allowed, undue prejudice to the opposing party, and futility.”
 26 *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) (citing *Foman v.*
 27

28 ¹ Unless otherwise indicated, in citing cases, all internal alterations, emphases, footnotes,
 quotation marks, and citations are omitted.

1 *Davis*, 371 U.S. 178, 182 (1962)). While prejudice carries the most weight, *id.*, “the court’s
2 discretion to deny such leave is particularly broad where the plaintiff has previously
3 amended its complaint.” *Ecological Rights Found. v. Pac. Gas and Elec. Co.*, 713 F.3d
4 502, 520 (9th Cir. 2013).

5 First, Defendants say N2 Packaging, having already amended their pleading once,
6 unduly delayed in raising its new allegations and amending a second time would prejudice
7 them. Second, they say amendment would be futile, as Nitrofin is not subject to personal
8 jurisdiction in Arizona. Both objections are well taken.

9 **A. Undue Delay and Prejudice**

10 Prejudice is the “touchstone of the inquiry under rule 15(a),” and absent prejudice
11 or a strong showing of the remaining factors, “there exists a presumption under Rule 15(a)
12 in favor of granting leave to amend.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d
13 1048, 1052 (9th Cir. 2003). This is not to say the other factors are unimportant—
14 particularly delay. *See Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 986
15 (9th Cir. 1999) (“Although delay is not a dispositive factor in the amendment analysis, it
16 is relevant, especially when no reason is given for the delay.”). For instance, one type of
17 prejudice is “the burden of necessary future discovery.” *See Jackson v. Bank of Haw.*, 902
18 F.2d 1385, 1387-88 (9th Cir. 1990); *see also Priddy v. Edelman*, 883 F.2d 438, 447 (6th
19 Cir. 1989) (“Putting the defendants through the time and expense of continued litigation
20 on a new theory, with the possibility of additional discovery, would be manifestly unfair
21 and unduly prejudicial.”). This type of prejudice can result from a delayed motion for leave
22 to amend. *See, e.g., Lockheed Martin*, 194 F.3d at 986 (“A need to reopen discovery and
23 therefore delay the proceedings supports a district court’s finding of prejudice from a
24 delayed motion to amend the complaint.”). In addition, even if a delayed motion for leave
25 is made well before the close of discovery, opposing parties can still be prejudiced by
26 having to scramble to address new theories and allegations and resultingly incur high,
27 additional litigation costs that could have been avoided had the moving party pursued such
28 theories and allegations in its original complaint. *See AmerisourceBergen Corp. v.*

1 *Dialysist W., Inc.*, 465 F.3d 946, 953-54 (9th Cir. 2006) (finding the district court did not
2 abuse its discretion in denying a motion for leave to amend when the motion was made
3 with eight months of discovery remaining).

4 In evaluating undue delay, the court should inquire “whether the moving party knew
5 or should have known the facts and theories raised by the amendment in the original
6 pleading.” *Id.* at 953. Whether a motion to amend is filed within the time allowed by a
7 scheduling order is not dispositive. *Id.* at 952-53.

8 N2 Packaging’s new allegations concerning Defendants are untimely and would
9 prejudice Defendants and B.C. Limited. The Second Amended Complaint was proposed
10 thirteen months into this lawsuit and is based on facts known or knowable to N2 Packaging
11 in February 2019. Indeed, N2 Packaging already alleged Defendants “misappropriated
12 confidential information and trade secrets from Plaintiff to Nitrofin.” (Doc. 72 at 2.)
13 Moreover, the First Amended Complaint is replete with allegations regarding the conduct
14 that is now being given a new legal sheen—Defendants’ creation of Nitrofin and Nitrofin’s
15 successful attempts to pass off N2 Packaging’s packaging systems as its own. (*See*
16 *generally* Doc. 9 at ¶¶ 92-116.)

17 That new legal sheen would transform this case. Though N2 Packaging contends
18 the Second Amended Complaint would merely “clarify the allegations” in the First
19 Amended Complaint and not introduce “new concepts to this litigation,” it would change
20 the rights on which many of N2 Packaging’s claims are based. Indeed, numerous contract-
21 based claims in the First Amended Complaint are founded on Defendants’ alleged
22 misappropriation of N2 Packaging’s “Intellectual Property”—which is defined as five
23 patents that are detailed therein. (*See* Doc. 9 at ¶¶ 25, 28, 31, 34, 37 n.1, 38.) These claims,
24 notwithstanding their labels, “are rights of action under the patents . . . [that] necessarily
25 require resolution of Plaintiff’s patent rights which are necessary elements of express or
26 implied agreements not to infringe the Intellectual Property/Patent rights.” *N2 Packaging*
27 *Sys. LLC v. N2 Pack Canada Inc.*, No. CV-19-02351-PHX-NVW, 2019 WL 8326681, at
28 *1 (D. Ariz. June 12, 2019).

1 However, the Second Amended Complaint does not mention these patents. Rather,
 2 they primarily concern different assets, N2 Packaging’s “Confidential Information”² (*see*,
 3 *e.g.*, Doc. 72-1 at ¶¶ 201-02), and “trade secret modifications.” (Doc. 72-1 at ¶ 36.) For
 4 example, while the breach of contract claim in Count 1 of the First Amended Complaint
 5 alleges N2 Pack Canada, Abellan, Marciniak, and Pogue breached section 11(1) of the
 6 Supply Agreement in part by providing certain individuals and entities “with access to the
 7 Proprietary Process and N2 Packaging’s Intellectual Property,” (*id.* at ¶ 123), that same
 8 claim in the Second Amended Complaint does not refer to “Intellectual Property.” (*See*
 9 *generally* Doc. 172-1 at ¶¶ 167-76.) Instead, it states N2 Pack Canada, Abellan, Marciniak,
 10 and Pogue breached section 11 of the Supply Agreement in part by “improperly disclosing
 11 Confidential Information related to the Proprietary Process.” (*Id.* at ¶ 172.) These claims
 12 are no longer “rights of action under patents.” *See N2 Packaging Sys. LLC*, 2019 WL
 13 8326681, at *1.

14 Further, the Second Amended Complaint would prejudice Defendants and B.C.
 15 Limited. They have already spent months conducting discovery on the claims in the First
 16 Amended Complaint, as they have propounded their disclosure responses and written
 17 discovery. They have also received discovery requests from N2 Packaging. Now, they
 18 would be forced to begin discovery on the claims in the Second Amended Complaint with
 19 only months to go until the close of discovery. “Justice does not so require[.]” forcing them
 20 to scramble to address N2 Packaging’s latest theory of the case. *See Fed. R. Civ. P.*
 21 15(a)(2).

23 ² N2 Packaging’s “Confidential Information” that was shared with the N2
 24 Canada Defendants include, but is not limited to: the N2 Packaging
 25 Equipment Trade Secrets; confidential business leads; information relating
 26 to N2 Packaging’s manufacturers; policies and procedures; internal product
 27 testing and design information; N2 proposed patent modifications,
 28 betterments, and improvements; confidential customer information; business
 plans; business and financial projections; business models; marketing
 strategies and plans; internal business practices; business contracts and other
 confidential business documentation; research and development information;
 consumer survey information; training manuals; confidential vendor
 information; and confidential compliance documentation.

(Doc. 72-1 at ¶ 89.)

1 In the Court's discretion and in the detailed context of this litigation, N2 Packaging
2 will be denied leave to amend their allegations regarding Defendants.

3 **B. Futility**

4 "Where the legal basis for a cause of action is tenuous, futility supports the refusal
5 to grant leave to amend." *Lockheed Martin*, 194 F.3d at 986. "Futility of amendment can,
6 by itself, justify the denial of a motion for leave to amend." *Gonzalez v. Planned*
7 *Parenthood of L.A.*, 759 F.3d 1112, 1116 (9th Cir. 2014). "[L]eave to amend should be
8 denied as futile only if no set of facts can be proved under the amendment to the pleadings
9 that would constitute a valid and sufficient claim or defense." *Barahona v. Union Pac.*
10 *R.R. Co.*, 881 F.3d 1122, 1134 (9th Cir. 2018).

11 Leave to amend to add claims against Nitrocin must be denied as futile. Allegations
12 in the Second Amended Complaint demonstrate that Nitrocin is subject to jurisdiction in
13 other states and therefore is not subject to personal jurisdiction in this Arizona federal court
14 under Federal Rule of Civil Procedure 4(k)(2).

15 **1. Rule 4(k)(2) Does Not Give Jurisdiction Over Nitrocin in Arizona** 16 **Because Utah and Idaho Courts Have Jurisdiction**

17 Personal jurisdiction can be established under Rule 4(k)(1) or Rule 4(k)(2). Rule
18 4(k)(1) is not relevant to this case, as Nitrocin is not subject to general or specific
19 jurisdiction in Arizona. But N2 Packaging argues Nitrocin is subject to the jurisdiction of
20 this Court (or any federal district court) under Rule 4(k)(2), which states:

21 *Federal Claim Outside State-Court Jurisdiction.* For a claim that arises
22 under federal law, serving a summons or filing a waiver of service establishes
23 personal jurisdiction over a defendant if: (A) the defendant is not subject to
24 jurisdiction in any state's courts of general jurisdiction; and (B) exercising
jurisdiction is consistent with the United States Constitution and laws.

25 "First, the claim against the defendant must arise under federal law. Second, the
26 defendant must not be subject to the personal jurisdiction of any state court of general
27 jurisdiction. Third, the federal court's exercise of personal jurisdiction must comport with
28 due process." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1159 (9th Cir. 2006). Rule

1 4(k)(2) “provides for what amounts to a federal long-arm statute in a narrow band of cases
2 in which the United States serves as the relevant forum for a minimum contacts analysis.”
3 *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1126 (9th
4 Cir. 2002) (citing Fed. R. Civ. P. 4(k)(2) advisory committee’s note to 1993 Amendment).
5 “The due process analysis under Rule 4(k)(2) is nearly identical to traditional personal
6 jurisdiction analysis with one significant difference: rather than considering contacts
7 between the [foreign] entities and the forum state, we consider contacts with the nation as
8 a whole.” *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450, 462 (9th Cir.
9 2007).

10
11 Here, the first and third requirements are not in play. At least one of N2 Packaging’s
12 proposed claims against Nitrocin arises under federal law, and Defendants and B.C. Limited
13 do not contest that it would comport with due process for the United States to exercise
14 jurisdiction over that claim against Nitrocin. At issue is the second requirement of Rule
15 4(k)(2) that the claim against Nitrocin not be within the jurisdiction of any state’s courts of
16 general jurisdiction.

17 The allegations in the Second Amended Complaint itself subject Nitrocin to the
18 personal jurisdiction of Utah and Idaho courts for N2 Packaging’s federal claim. N2
19 Packaging alleges Nitrocin fulfilled an order for a customer in California (Doc. 72-1 at ¶
20 162), has solicited a prospective customer in Kentucky (*id.* at ¶ 165), and has installers
21 working in Utah and Idaho (*id.* at ¶ 164). Courts in Utah and Idaho can exercise
22 jurisdiction over Nitrocin because Nitrocin has employees in those states contributing to
23 Nitrocin’s misappropriation of N2 Packaging’s trade secrets. *See, e.g., Island Tobacco Co.*
24 *v. R.J. Reynolds Indus., Inc.*, 513 F. Supp. 726, 739 (D. Haw. 1981) (“Personal jurisdiction
25 will be found when foreign corporations have placed their employees within the forum
26 state.” (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980)); *cf.*
27 *Wood v. Kinetic Sys., Inc.*, No. CV 09-575-S-CWD, 2010 WL 893647, at *6 (D. Idaho
28 Mar. 9, 2010) (finding the defendant “purposefully availed itself of the privilege of

1 conducting activities in Idaho by hiring an Idaho employee and maintaining the ability to
2 do business as a contractor in Idaho”). It is a closer question whether Nitrocin is subject to
3 jurisdiction in California or Kentucky for the federal claim, but the question need not be
4 answered, given the dispositive allegations regarding Utah and Idaho.

5 As N2 Packaging’s allegations show Nitrocin is subject to the personal jurisdiction
6 of Utah and Idaho courts, Rule 4(k)(2) cannot apply and does not confer jurisdiction over
7 Nitrocin in this federal court or in any federal court. That is the end of the discussion and
8 requires denial of N2 Packaging’s attempt to add Nitrocin as a defendant.

9 **2. Rule 4(k)(2) Does Not Require an Absent Foreign Defendant to**
10 **Stipulate to Jurisdiction in Another State to Defeat Jurisdiction**
11 **in any District under that Rule**

12 That should be the end of the discussion to reject the claim of Rule 4(k)(2)
13 jurisdiction. But more discussion is appropriate to explain the etiology of N2 Packaging’s
14 bold contention that the second requirement of Rule 4(k)(2) jurisdiction can be defeated
15 only by the absentee foreign defendant stipulating to jurisdiction in some other state—
16 which, of course, the absentee cannot be compelled to do because it is not currently a party
17 to this proceeding. And since the absentee foreign defendant is never a current party on a
18 motion to add that new defendant, N2 Packaging’s contention means that the second
19 requirement of Rule 4(k)(2) jurisdiction can never be defeated and is always established
20 merely by a plaintiff amending to bring in a new foreign defendant. But no rule of law
21 works that way, where one side always wins or loses. It turns out that this rule of law does
22 not work that way either.

23 The grant of in personam jurisdiction under Rule 4(k)(2) is extremely rare³ and even
24 more extremely narrow. A plaintiff invoking that jurisdiction must plead facts showing

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26 ³ “Indeed, in the fourteen years since Rule 4(k)(2) was enacted, none of our cases has
27 countenanced jurisdiction under the rule.” *Holland Am. Line Inc.*, 485 F.3d at 462. *AMA*
28 *Multimedia LLC v. Wanat*, No. CV-15-01674-PHX-ROS, 2017 WL 5668025, at *5 (D.
Ariz. Sept. 29, 2017) (“The situation after 2007 has not changed. The parties have not cited,
nor has the Court located, any post-2007 case from the Ninth Circuit allowing jurisdiction
under Rule 4(k)(2).”)

1 the foreign defendant and the claim have enough contacts with the United States as a whole
2 that basic fairness allows this country to exercise adjudicatory jurisdiction over the claim
3 and the defendant. But the plaintiff cannot plead—and there cannot be—enough contacts
4 between the claim, the defendant, and the forum for the courts of any particular state to
5 have adjudicatory jurisdiction. It is not logically impossible for such a space to exist, but
6 it is planted around with procedural punji stakes. The slightest short step or overstep is
7 fatal. In this case, N2 Packaging stepped on the punji stakes by pleading bases for
8 jurisdiction in Utah and Idaho, so Nitrofin is subject to jurisdiction in those states but not
9 to nationwide federal court jurisdiction under Rule 4(k)(2).

10 The unusual character and structure of Rule 4(k)(2) has led to a court-made rule in
11 the Ninth Circuit and elsewhere⁴ placing the burden of proof on a foreign defendant who
12 denies Rule 4(k)(2) jurisdiction to identify or stipulate to another state which does have
13 jurisdiction over him. A foreign defendant defeats Rule 4(k)(2) jurisdiction by showing
14 any state has personal jurisdiction. “Ordinarily, the plaintiff bears the burden of proving
15 personal jurisdiction over the defendant. However, proving the lack of personal
16 jurisdiction in every state could be quite onerous, and it is the defendant, not the plaintiff,
17 that likely possesses most of the information to do so.” *Holland Am. Line Inc.*, 485 F.3d
18 at 461. Rather than the plaintiff having to show, as under the usual standard of pleading
19 and proof, that none of 50 states has jurisdiction, the foreign defendant can defeat Rule
20 4(k)(2) jurisdiction in the district of the plaintiff’s choice by stating, and thus stipulating,
21 what state does have jurisdiction. This gives the foreign defendant the benefit of not being
22 sued in any of 94 districts of the plaintiff’s choice, but it also frees the plaintiff from having
23 to prove personal jurisdiction in the state the foreign defendant has elected:

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27 ⁴ *Holland Am. Line Inc.*, 485 F.3d at 461; *ISI Int’l, Inc. v. Borden Ladner Gervais LLP*,
28 256 F.3d 548, 552 (7th Cir. 2001); *Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d
646, 651 (5th Cir. 2004); *Mwani v. bin Laden*, 417 F.3d 1, 11 (D.C. Cir. 2005); *Oldfield v.*
Pueblo De Bahia Lora, S.A., 558 F.3d 1210, 1219 n.22 (11th Cir. 2009); *Touchcom, Inc.*
v. Bereskin & Parr, 574 F.3d 1403, 1415 (Fed. Cir. 2009).

1 A defendant who wants to preclude use of Rule 4(k)(2) has only to name
2 some other state in which the suit could proceed. Naming a more appropriate
3 state would amount to a consent to personal jurisdiction there If,
4 however, the defendant contends that he cannot be sued in the forum state
5 and refuses to identify any other where suit is possible, then the federal court
is entitled to use Rule 4(k)(2). This procedure makes it unnecessary to traipse
through the 50 states, asking whether each could entertain the suit.

6 *Id.* (This elimination of the second element of Rule 4(k)(2) does not satisfy Rule 4(k)(2)
7 entirely. A foreign defendant can still defeat Rule 4(k)(2) jurisdiction by showing
8 insufficient contacts with the United States as a whole. *Holland Am. Line Inc.*, 485 F.3d
9 at 462.)

10 N2 Packaging argues the second requirement of Rule 4(k)(2) has been eliminated
11 because Nitrofin has not consented to personal jurisdiction in some other state. If Nitrofin
12 were a party to this action, this burden-shifting rule requiring Nitrofin to name a more
13 appropriate state to blunt the requirement that no other state have jurisdiction still would
14 not apply because, as discussed above, N2 Packaging has already alleged sufficient
15 jurisdiction in Utah and Idaho. But even without N2 Packaging’s own fatal allegations,
16 Nitrofin is not an existing party to this case, and the existing parties have no authority or
17 ability to stipulate on Nitrofin’s behalf what states have jurisdiction over it.

18 The Ninth Circuit has never held the court-created burden to “name some other state
19 in which the suit could proceed”—and thereby consent to jurisdiction there—can be placed
20 on a party that cannot do so, who is not a pending party within the jurisdiction of the court.
21 *See id.* at 461. No court has so held. More concretely, no court has ever held that existing
22 parties opposing amendment to add defendants have any burden or authority to stipulate to
23 jurisdiction for absentees they do not represent.


24 Moreover, even where it applies, the *Holland* rule is not mandatory. The *Holland*
25 test does not require district courts to find the second requirement is satisfied even if a
26 defendant declines to identify an alternative forum. The *Holland* test in part states, “If,
27 however, the defendant contends that he cannot be sued in the forum state and refuses to
28 identify any other state where suit is possible, then the federal court is entitled to use Rule

1 4(k)(2).” *Id.*; e.g., *Falcon Enters., Inc. v. Centurion Ltd.*, No. C07-0065RSL, 2007 WL
2 3046201, at *3 (W.D. Wash. Oct. 18, 2007) (finding “the ‘is entitled to’ language . . .
3 mean[s] what its [sic] says, namely that the Court has the option to presume that nationwide
4 service is appropriate if defendant refuses to identify an alternative forum but that it is not
5 required to do so” and declining to impose Rule 4(k)(2) jurisdiction.)

6 Finally, N2 Packaging argues “If for any reason the Court finds, at this stage, that
7 it would not have jurisdiction over Nitrocin, ample authority supporting an opportunity to
8 correct the SAC exists.” (Doc. 74 at 10 (internal citations omitted).) However, N2
9 Packaging keeps it a perfect secret what new allegations it would make to cure the
10 deficiency in its motion and the Second Amended Complaint. That too is denied.

11 IT IS THEREFORE ORDERED that Plaintiff and Counter-defendant N2 Packaging
12 Systems, LLC’s Motion for Leave to Amend First Amended Complaint (Doc. 72) is
13 denied.

14 Dated this 15th day of May, 2020.

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18 Neil V. Wake
19 Senior United States District Judge
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